

Administrative Enforcement Orders

Frequently Asked Questions

“HOW DO I...”

1. What are the authorities of the ALJ? Does anyone have any experience using them?

ANSWER: In accordance with the Administrative Procedures Act (Government Code § 11510 et seq), the ALJ has the authority to decide pre hearing matters such as discovery (exchange of information about the case), conduct the hearing very much like a judge in court and issue a proposed decision for the UPAs consideration. The ALJ acts as an impartial finder of fact to hear the evidence and provide a sound legally based opinion. The proposed decision made by the ALJ is not binding to either party, as the UPA has the discretion to accept, modify or set aside the ALJ’s proposed decision and rehear the matter. (Be aware that modifying or rehearing the matter are very technical matters that require assistance of legal counsel.)

San Luis Obispo County is the only CUPA to date that has had a hearing conducted using the ALJ. DTSC and other state agencies have had hearings conducted using the ALJ.

2. What should a UPA do if the respondent brings an attorney?

ANSWER: It is strongly suggested that the UPA have their attorney (counsel) present when the respondent brings their attorney. Ask the facility if they will be bringing their attorney. This can be done at the time the business calls to set up the appointment for the negotiation or discussion.

3. How should I coordinate with local prosecutorial agencies?

ANSWER: Each UPA has a different working relationship with their City Attorney and/or District Attorney’s office and there is no standard process for coordinating enforcement cases. As a general rule, cases should be discussed and provided to local prosecuting agencies for review prior to issuing an AEO. The following information should be provided to the local prosecutor: the violations involved, a brief summary of the case, the proposed penalties, a copy of the draft order, any extenuating circumstances (i.e. history of late/missed permit payments) and compliance history.

Every UPA should be an active member of its local environmental task force. These groups provide a means of communications with local prosecutors and an opportunity to discuss cases. For your local task force, see: <http://www.calepa.gov/Programs/TaskForce/DTSCContact.htm>

4. What is the burden of proof in an AEO?

ANSWER: The UPA bringing the action has the burden to prove each element of every alleged violation by a “preponderance of the evidence” (more likely than not). Who committed the violation (does the AEO name the correct party) and the date (must be within the statute of limitations) and location (must be within the UPAs jurisdiction) must also be proved.

5. How can I find an agency that has done a similar AEO?

ANSWER: Check with the AEO Technical Advisory Group (TAG). Some AEOs may be available from Cal/EPA and /or the Forum Board.

6. If I have a unique question/issue, where can I go to get answers?

ANSWER: Each UPA is supposed to have sufficient legal counsel. In addition, Cal/EPA and CUPA staff may be contacted and/or the AEO TAG.

7. Where can I find the comprehensive guidance on AEOs?

ANSWER: CUPA Forum Board Website, conference-training materials, and the Cal/EPA Unified Program website.

CHOOSING AN ORDER

1. What is the difference between a Consent Order versus a Stipulation Order?

ANSWER: The difference is how they are used at DTSC. This is not binding on how they are used by UPAs. As used by DTSC, the Consent Order is used to document an agreement reached with the “responsible party” BEFORE ever issuing a signed order (like a unilateral order). The Stipulation Order (or Stipulation & Order) is used to document an agreement reached with the “responsible party” AFTER a signed order has already been issued. More generically, the Consent Order is used to note that the parties agree to settle without issuing the order. The Stipulation Order is used to document settlement or changes to an existing order. This language can be found in paragraph (1) of the orders. However, as long as the language of the order correctly states the facts of how/when agreement was reached, any settlement agreement can have the title “Consent Order” or “Stipulation Order” or “Stipulated Order.”

2. What do you do if you don’t get a response to a letter of intent?

ANSWER: There are many answers to this question. How to handle each case should be discussed with the UPAs management and legal counsel. The UPA may attempt to contact the business to ensure that the letter was received and that it has reached an appropriate level within the business (i.e. management). All correspondence regarding an AEO should be addressed to the highest level individual in the organization (ie. The owner). A second letter may also be sent “return receipt requested” as an attempt to ensure its receipt. Other alternatives are detailed below:

The draft order alternative may be more effective than the letter of intent because it will include a copy of the draft order. This may provide more incentive to the business to respond given that it includes the corrective actions and a penalty amount, although these same factors may make some business more defensive and less likely to negotiate.

Another alternative is to issue a final unilateral order. This is a legally binding document that must be complied with. The conditions laid out in a unilateral order may be changed or negotiated, as long as the changes are documented in a Stipulation Order (remember, this is negotiated and signed after an order has been signed and issued). A potential problem with this

alternative is that if a business ignores the conditions in the order, the enforcement of the order must be taken to civil court for referral. Issuing a final unilateral order may also diminish the possibility of negotiation.

Another alternative is to refer the issue to the District or City Attorney to prosecute the case as a civil or criminal matter. Prosecutors should be consulted about the use of the AEO process in general and when specific cases occur.

PROBLEMS/NON-COMPLIANCE

1. What do you do if the respondent does not comply with an order?

ANSWER: If a final order has been issued, either as a one-party signed Unilateral Order or as a two-party signed Consent or Stipulated Order, the conditions in that order are legally binding. If the order is not being complied with it should be referred to the prosecuting agency for civil or criminal filing. Prior to taking the case to the prosecuting agency, it is often best to make multiple efforts to determine why the conditions of the order are not being met through phone calls or face-to-face meetings.

2. How do you handle a respondent who simply doesn't pay?

ANSWER: The conditions of final, signed orders are legally binding. If a respondent refuses to pay, the case may be referred to the prosecuting agency for civil or criminal filing. Be aware that prior to taking the case to the prosecuting agency, it is often best to make multiple efforts to determine why the conditions of the order are not being met through phone calls or face-to-face meetings.

Also, as stated in #4, a UPA may apply to the clerk of the appropriate court to convert an AEO (see HSC § 25404.1 et seq) for a judgment to collect an administrative penalty for an AEO or decision that has become final (HSC § 25404.1.3).

SUPPLEMENTAL ENVIRONMENTAL PROJECTS

1. What is a SEP?

ANSWER: SEP is the acronym for Supplemental Environmental Project. Additional relief remediating the adverse public health or environmental consequences of the violations at issue may be included in a settlement to offset the effects of the particular violation. As part of the settlement, the UPA may require the respondent undertake supplemental environmentally beneficial expenditures that exceed regulatory requirements. These additional projects are known as supplemental environmental projects, or SEPs. SEP categories include pollution prevention, pollution reduction, environmental protection and restoration, environmental compliance promotion, public health, and emergency planning/preparedness. Examples and detailed descriptions of these categories can be found in the Cal/EPA "Recommended Guidance on Supplemental Environmental Projects" –

<http://www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf>

2. When applying SEPs should the penalty be offset by the worth of the SEP?

ANSWER: As a general rule, the value of the SEP should exceed the dollar value of the penalty waived. SEPs should offer a significant environmental or public health benefit for the amount of penalty waived. As an example, if a respondent agrees to host businesses compliance” training and the total cost of hosting is \$5000, the penalty should not be reduced by more than \$5000. SEP guidance published by Cal/EPA suggests that the amount of penalty waived be no more than 25% of the total penalty assessed, not including administrative costs. Even when conditions exist which justify the approval of a SEP, the penalty policies of the UPA should still require that an adequate monetary penalty be assessed. This penalty should be sufficient to provide a deterrent effect as well as to remove any unfair competitive advantage or economic benefit gained by the facility respondent’s noncompliance.

3. How would you suggest we bring up SEPs in the initial meetings?

ANSWER: SEPs and other settlement terms should not be discussed until the UPA and the Respondent agree on the facts and the violations that have been alleged. Then when penalty amounts and settlements are discussed, it may be appropriate to bring up that SEPs may be a part of a settlement. Your agency or the responsible party can propose SEPs. If you believe that the responsible party can, and will, abide by the conditions of any SEPs, it can greatly assist in negotiations if the SEPs have been considered before the initial meeting. As each negotiation is unique, you may find it to your benefit to hear everything the responsible party has to say regarding the violations and proposed penalties before bringing up the SEP concept or offering the respondent the opportunity to identify a SEP in the initial meeting. Respondents that appear willing to readily settle will often be open to discussing SEPs in the initial meeting. Being familiar with SEP guidance and examples such as those in the Cal/EPA SEP guidance can be very valuable at this point.

NOTE: SEPs can be time consuming and difficult to track compliance with. It is strongly recommended you discuss SEPs with an agency that has experience with them. Many agencies have reduced or stopped using SEPs as a result of difficulties and staff time demands. The Regional Water Boards conducted an audit of SEPs and found that many did not provide the benefits and results agreed to.

PENALTIES

1. How do you recommend we evaluate a business ability to pay?

ANSWER: Training on the ability to pay will be provided at the CUPA Conference and by the SWRCB and DTSC. There is information about computer programs that analyze ability to pay to the US EPA websites.

2. What is a “forensic accountant” and how can I find one?

ANSWER: A forensic accountant is to accounting what a forensic medical expert is to a medical doctor. The forensic accountant goes beyond the numbers, or behind the numbers, to decipher and explain for others, and sometimes for a court proceeding, what a transaction or series of transactions may mean in lay person’s terms. The forensic accountant may also be a CPA and also a CFE (Certified Fraud Examiner), is an expert in the “science” of accounting, and also the forensic skills required for developing and presenting evidence suitable for a legal proceeding.

How to find one? Professional listings can be found in the yellow page listings and listings on the web. Other sources for review of financial records include your County Family Support Office or the DA's Consumer Fraud Unit, who may have resources in this area.

ADMINISTRATIVE LAW JUDGE ISSUES

1. When do I have to contact the Administrative Law Judge?

ANSWER: Within 90 days of receipt of the Notice of Defense (NOD) by the UPA, the hearing shall be scheduled (HSC §25404.1.1(e)). Respondents routinely file the Notice of Defense to reserve their rights, but a settlement can still be reached after the Notice has been filed. The process for contacting an ALJ can be found on the Cal/EPA Website at <http://calepa.ca.gov/CUPA/Publications/> under Guidance for Administrative Enforcement Order (AEO) and Hearing Procedures.

2. Who is responsible to pay for the Administrative Law Judge?

ANSWER: The responsibility to pay for the ALJ is with the UPA bringing the action. However, there is a contract at this time (fiscal year 03-04), between Cal/EPA and OAH that will cover the costs of a hearing on an order issued by an UPA. Although a contract is in place through June 30, 2004, and Cal/EPA will consider extending it for another year, the current fiscal difficulties make the extension uncertain. Each agency should plan for these costs after that date.

3. Can I add ALJ costs to the AEO cost recovery total?

ANSWER: No. Every respondent is entitled the right to due process of law and therefore do not have to pay for it. If the matter ultimately settles, a Respondent could but does not have to agree for paying for costs, including the ALJ. All penalty monies from an AEO are retained by the UPA and these funds could be used to pay for or to reimburse the account that paid for the ALJ.

4. Can I use a different hearing officer than the Administrative Law Judge?

ANSWER: The option to use a different hearing officer lies with the respondent only if the UPA has designated a local hearing officer. The respondent can then choose between an ALJ from the Office of Administrative Hearings or a local hearing officer designated by the UPA. If the UPA does have a local hearing officer, they must conduct the hearing in accordance with the Administrative Procedures Act.

MISCELLANEOUS

1. What violations of 6.95 would be appropriate for the AEO process? Are there any that would be inappropriate?

ANSWER: The AEO can be used for any violation of Article 1 (business plans) per HSC §25514.5 or Article 2 (RMP) per HSC § 25540 that is not a minor violation as defined in section 25404.1.2. What enforcement response is appropriate should be addressed in the UPAs enforcement plan and by coordination with prosecutors such as the local City or District Attorney.

2. What were the specific issues that had to be worked out in AB 1640 (2003 CUPA Bill) that related to the AEO process, and will those changes affect the current AEO process? How?

ANSWER: AB1640 (2003) removed AEO authority for violation of corrective action orders in the UST program. This had been inadvertently added in the previous legislation.

The bill provides the following new AEO tools:

- a. A UPA may suspend or revoke any unified program facility permit or element of such permit for not paying the permit fee or a fine or penalty associated with the permit.
- b. A UPA may apply to the clerk of the appropriate court to convert an AEO (see HSC § 25404.1et seq) for a judgment to collect an administrative penalty for an AEO or decision that has become final (HSC § 25404.1.3).
- c. Existing law requires businesses that handle hazardous materials to prepare a business plan and submit an annual inventory form to the AA. The term “business” is defined as including the federal government, as specified, or any agency, department, office, board, commission or bureau of state government, including, but not limited to, the campuses of the California Community Colleges, the California State University, and the University of California. This bill includes in the definition of business, any agency, department, office, board, commission, or bureau of a city, county or district.
- d. Existing law provides for the imposition of civil and criminal penalties upon stationary sources with regard to the program to prevent accidental releases of regulated substances. However, the provision only applied to “stationary sources” not persons. This bill includes a new definition of the term “person” for purposes of the provisions regulating accidental releases and would authorize the imposition of civil and criminal liability upon a person who violates those provisions. Knowing violations are first time misdemeanors, second time wobblers.